SEP 5 1972

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-378

CLIFFORD HENRY,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner Clifford Hersh prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled matter on July 7, 1972.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It is reproduced as Appendix A herein. No opinion was prepared by the District Court.

JURISDICTION

The opinion and judgment of the Court below were entered on July 7, 1972, affirming Petitioner's conviction in the United States District Court for the Northern District of California for violating Title 18 U.S.C., Section 371. By order entered on August 3, 1972, Mr. Justice Douglas extended Petitioner's time within which to file a Petition for Writ of Certiorari to and including September 5, 1972. Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether Petitioner's Motion to Suppress, made on the ground that certain observations made by deputy sheriffs which led to his arrest and the seizure of certain physical evidence, violated Petitioner's reasonable expectation of privacy, and on the further ground that the arrest was in any event made without probable cause, was improperly denied.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Petitioner, together with one Varga, was charged by an Indictment returned on April 21, 1971, with two sales of the drug lysergic acid diethlamide (LSD), and with conspiracy to sell dangerous drugs. The conspiracy was alleged to have occurred during the period March, 1969 through July, 1970, and as an overt act in furtherance of the conspiracy, it was further alleged that "[o]n or about March 7, 1969 Botond Endre Varga and Clifford Louis Hersh possessed and operated a laboratory for the manufacture of phencyclidine hydrochloride at 1600 Yount Mill Road, Yountville, California." (Record on Appeal, [hereinafter referred to as R.], Vol. 1, p. 2).

Petitioner's case was severed from that of his co-defendant, who is still awaiting trial. Petitioner was tried twice. The first trial resulted in a hung jury, and at the conclusion of the second trial on September 17, 1971, Petitioner was acquitted of the two substantive charges of sale of LSD. He was found guilty, however, of the conspiracy charge, and thereafter appealed from the judgment and sentence entered upon that verdict.

In aid of proving the overt act regarding the alleged manufacturing operation at the Yount Mill Road address, a crucial aspect of the prosecution's case, the government introduced, over Petitioner's timely objection, certain pieces of laboratory equipment, together with a small quantity of phencylidine (PCP), which had been seized from Petitioner following his warrantless arrest in Yountville on March 7,

1969. Pursuant to Rule 41(e), Fed.R.Crim.P., Petitioner had previously filed a timely Motion to Suppress the evidence thus acquired. An evidentiary hearing was conducted which developed the following facts and circumstances:

On March 6, 1969, deputy sheriffs of the Napa County Sheriff's Department were contacted by a roofing contractor named McGregor, who reported that while performing roof repairs the previous day at 1600 Yount Mill Road, a private residence, his suspicions had been aroused as a result of his discovery that most of the windows in the home were covered by curtains or blankets. He ultimately located a crack he could peer through, and was thus able to observe what appeared to him to be laboratory equipment.

After receiving McGregor's report, two deputies went with McGregor during the afternoon of the 6th to the house to conduct an investigation. They had no search or arrest warrant. Upon arrival, they knocked on the front door, but received no response. They then circled the home to determine whether anyone was on the property, and in the process, attempted to look through some of the windows in the home (Transcript of Motion to Suppress Hearing, [hereinafter Tr. M.S.] pp. 22-23). As McGregor had reported, most of the windows were covered by curtains or drapes, as was the front window which the officers ultimately peered through. That window, according to the testimony, was "in the front," and "near the door." (Tr. M.S., p. 23) "It had a drapery or blanket over it,"

but "[o]n the right corner of the window * * * there was maybe two or three inches that it didn't quite cover against the wall and you could see through that portion." (Tr.M.S., p. 24)[1]

Through the tiny aperture thus described, the deputies observed beakers, two oxygen-type tanks, numerous beakers and paraphernalia sitting on a table. and what appeared to be a white powdery substance scattered on the floor. (Tr.M.S., p. 25)

Inspired by what they had observed, the deputies went to a neighboring premises, where they interviewed a Victor Milhouse. Milhouse, according to the deputies' testimony, (Tr.M.S., p. 30-31) had been keeping a "log" of the movements of the occupants of the premises next door, which reflected comings and goings "at rather odd hours."[2] (Tr.M.S., p. 31). In addition, Milhouse also advised that by watching his neighbors through binoculars, he had determined that various chemicals had been taken into the house, but the record is silent as to what sort of chemicals these might have been. (Tr.M.S., p. 33) Additionally, Milhouse furnished no physical description whatsoever of any of the individuals he had observed in and about the premises.

At the conclusion of the Milhouse interview, the officers asked Milhouse to notify them if anyone returned to the house. (Tr.M.S., p. 34)

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[1]The testimony quoted is that of one of the deputies, and constitutes the only evidence in the record which was properly before the court below with respect to the location and description of the window through which the deputies peered.

[2]The "log" was not produced at the hearing.

The deputies next contacted a real estate agent who had rented the subject property. That individual advised that a 30 year old white male, with longish hair, who gave his name as Powell and represented himself as a programmer in the Bay Area looking for a place in the country to relax awhile, had leased the property on an unspecified date. (Tr.M.S., pp. 34-35) It was also determined that the utilities were being billed to "a Mr. Powell." (Tr.M.S., p. 35)

The following day, March 7th, the deputies received a telephone report from the Milhouse residence at approximately 5:00 p.m. to the effect that a small, white foreign type vehicle had arrived at the neighboring residence and had left a short time later. Young Milhouse furnished a partial license number, and the deputies thereupon set out to locate the car. Eventually a car matching Milhouse's description was observed headed South out of the county, and by checking Department of Motor Vehicle Records, it was determined that the registered owner was Petitioner Hersh. The record is devoid of any description of the driver. (Tr.M.S., pp. 36-37)

Approximately two and one-half hours later, the deputies received word, again from the Milhouses, that there were now two vehicles next door, and that a number of people appeared to be loading things into them. The deputies proceeded immediately to the residence, and through binoculars observed tanks, similar to those they had previously observed through the crack in the window covering, being removed from

the house to the cars.[3] They also observed boxes being likewise removed, saw smoke emanating from the chimney—the night was cold—and when they ultimately observed some of the lights go out in the home and the two vehicles start to leave, they swooped down on the three occupants,[4] removed them from the vehicles, and arrested them for "investigation of manufacturing a restricted or dangerous drug." (Tr.M.S., pp. 38-41) The officers had no warrant, and neither officer had ever seen any of the arrested individuals previously.

Following the arrest, a search of both vehicles was conducted, and it was the evidence thus obtained that was the object of Petitioner's Motion to Suppress.

Following the evidentiary hearing, the matter was argued and submitted, but because of the untimely death of the judge who heard the Motion, the matter was ultimately reassigned to the judge who presided over Petitioner's initial trial. He denied the Motion, but when the case was reassigned for a second trial, Petitioner was allowed to renew his Motion prior to the enpanelment of the jury. To supplement the record, which at that point consisted solely of the transcript of the evidentiary hearing previously conducted (R., Vol. II, p. 8), Petitioner was allowed to briefly testify. According to Petitioner, the Yountville

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[3]Neither car was the white vehicle registered to Petitioner, and the deputies made no effort to determine the owner of either car now under surveillance.

[4]Petitioner Hersh, Mr. Varga, and a Mr. Cooper.

Road premises were, except for the driveway, completely fenced in, and were liberally posted with "No Trespassing" signs.[5] (R., Vol. II, p. 5)

At the conclusion of Petitioner's testimony, the Motion was argued, and the judge, the Honorable Walter E. Craig, denied it, stating simply that the deputies "looked through an aperture which was available to them" (referring to the observation of March 6th), and that "at the time they made the arrest * * * they had probable cause." (R., Vol. II, p. 26)

REASONS FOR GRANTING THE WRIT

It is Petitioner's position that the intial observations of the deputies who ultimately arrested him were made in violation of Petitioner's reasonable expectations of privacy, and therefore constituted an unreasonable search, invalidating the subsequent arrest and seizure made pursuant thereto. Although

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[5]At the prior evidentiary hearing, one of the deputies testified that he "didn't notice any 'No Trespassing' signs on the premises," (Tr.M.S., p. 26) and that he "didn't believe there was a fence around the *whole* property." (Tr.M.S., p. 27) [Emphasis supplied]. Clearly such testimony did not contradict Petitioner's testimony related above, and since the evidence thus adduced comprised the entire record before the judge whose ruling was ultimately challenged in the court below, Petitioner is at a loss to account for the assertion in the Court of Appeals' opinion that the record established that (1) signs reading "No Trespassing" were not posted on the premises, and that (2) the property was not enclosed with a fence. [Appendix A herein, p. iii].

the Court below seemed to be of the opinion that the observation complained of came within the purview of the "plain view" doctrine, Petitioner respectfully submits that the record herein at most establishes that the officers obtained visual access to the interior of the premises not by merely walking up to the front door and casually glancing through an immediately adjacent, uncovered window, but rather, by peeking with some difficulty through a tiny aperture in an otherwise fully covered window, located a few feet from the door. Moreover, it is absolutely clear from the record in any event that the occupants of the premises had gone to considerable lengths to cover over every available window, unambiguously communicating to all potential intruders that they both valued and sought to protect their privacy. The Fourth Amendment requires the government to honor such an expectation, clearly a reasonable one in this case, rather than to search about for a chink in the armor, as it were. This court has so held in *Katz v. United States,* 389 U.S. 347 (1967), and in Petitioner's view, the decision of the Court below is in sharp conflict with the law announced in that case. Certainly the intentional covering of all of the windows of a private dwelling entitles the occupants to at least the same expectation of privacy that arises upon the closing of the door of a public telephone booth.

The question of what constitutes a reasonable expectation of privacy is, of course, of crucial importance to the administration of criminal justice, as evidenced in part by this Court's action in granting

certiorari in *California v. Krivda,* ____ U.S. ____, 92 S.Ct. 1307 (1972), a case wherein the California Supreme Court included within the scope of a reasonable expectation of privacy garbage cans located at the curb in front of a private residence. *Krivda* represents, of course, the most recent decision by the highest Court of the State of California with respect to this area of the law, and while it was open to that Court to apply a more restrictive standard, from the point of view of the government, than that announced in *Katz, supra,* it did not do so. Instead, it simply applied the *Katz* decision as it understood it, and it thus appears that a conflict now exists between the Ninth Circuit and the California Supreme Court. Had Petitioner been prosecuted in the State Court, it seems clear that pursuant to *Krivda,* his Motion to Suppress would have been granted. Where both the State and Federal Courts purport to apply the same Constitutional standard, it is submitted that the results of a Motion to Suppress should not depend upon which Court the matter arises in.

Moreover, the permissive attitude exhibited by the Court below toward police spying through the windows of private homes is at such variance with decisions such as *State of Texas v. Gonzales,* 388 F.2d 145 (5th Cir. 1968), and *Brock v. United States,* 223 F.2d 681 (5th Cir. 1955), that a conflict among the circuits likewise appears to exist which this Court should resolve. Clearly a man's expectations of privacy should not be made to depend upon the geographical location of his residence.

Petitioner recognizes, of course, that the Court below was also of the opinion that regardless of the propriety of the officers' initial search, there existed sufficient independent grounds[6] to support the arrest of Petitioner and the attendant search of the vehicle he occupied. That position, however, represents such a sharp departure from the accepted and usual course of judicial proceedings in the area of the administration of criminal justice as to warrant review by this Court.

In Petitioner's view, the "independent grounds" were neither independent nor were they in any event such as to give rise to probable cause to make an arrest.

The mere presence of laboratory equipment in a home does not, in a country which prizes knowledge and scientific inquiry, provide reason for the seizure of a person on the ground that he is engaged in illegal conduct. Cf. *Stanley v. Georgia,* 394 U.S. 557, 567 (1969): "Given the present state of knowledge, the State * * * may [not] prohibit the possession of chemistry books on the ground that they may lead to manufacture of homemade spirits."

The fact that the officers "checked and determined to their satisfaction that no license or permit had been issued for the operation of a laboratory on the

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[6]The independent grounds are recited at p. v, Appendix A, *infra*.

premises" (Appendix A, p. v),[7] is similarly of no moment since to Petitioner's knowledge, there is no license or permit required by either Napa County or the State of California for the operation of a non-commercial laboratory. The officers' check, therefore, such as it was, could not have given rise to a reasonable suspicion that any crime was being committed. Nor may the "evacuation" of the premises (assuming an "evacuation" can properly be inferred from the removal of some boxes and tanks) "at an unusual time of the month," any more than strolling at an unusual time of night (see *Papachristou v. City of Jacksonville*, ... U.S. ....., 92 S.Ct. 839 (1972)) supply any proper inference of criminal activity. And the same can be said, of course, for the "odd hour arrivals to and departures from the house." (Appendix A, p. v)

Finally, Petitioner would question whether the fact that a man named Powell rented the home as a vacation spot, or that a vehicle which briefly visited the premises was registered to Petitioner Hersh rather than Powell, or that oxygen tanks and boxes were being moved from the house on a cold night while smoke came out of the chimney, either standing alone or taken in conjunction with the other facts cited by the Court below, could reasonably give rise to

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[7]It should be noted that the record before Judge Craig at the time he denied the Motion to Suppress does not support this statement of "fact." Evidence regarding the deputies' investigation with respect to the existence of a license was not adduced until after the second trial commenced, and even that evidence does not fully support the view that no license existed.

probable cause for making an arrest—particularly in view of the fact that since the officers had never seen any of the people arrested prior to the evening they were taken into custody, such information as the officers did have had no obvious application to the people they swooped down upon. A chemist quietly engaged in cancer research could properly be arrested under the facts relied on by the Court below.[8]

Moreover, it simply cannot be maintained in any event that the information the officers gathered came to them independent of their initial illegal search. It was not until after the deputies had conducted their search through the tiny crack in the curtain that they expanded their investigation and obtained the additional information, "exploiting," thereby, the "primary illegality." *Wong Sun v. United States,* 371 U.S. 471, 488 (1963).

In short, it is Petitioner's position that the decision of the Court below regarding the independent basis for the arrest, search and seizure is so plainly wrong, and represents such a sharp departure from traditional concepts of due process that this Court should review it.

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[8]It should be noted that even the arresting officers were not terribly certain of their grounds. According to the testimony, Petitioner was arrested for "Investigation of manufacturing a restricted or dangerous drug." (Tr.M.S., p. 41) Certainly police officers have the authority, under appropriate circumstances, to *detain* a suspect for "Investigation," but Petitioner knows of no authority which would permit an actual *arrest* for that purpose.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that his Petition for a Writ of Certiorari should be granted.

Dated, San Francisco, California,
August 30, 1972.

Respectfully submitted,
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PAUL G. SLOAN,
FRIEDMAN, SLOAN & HALVONIK,
Attorneys for Petitioner.

(Appendix A Follows)

Appendix A

United States Court of Appeals
for the Ninth Circuit

United States of America,
Plaintiff-Appellee,
vs.
Clifford Hersh,
Defendant-Appellant.
No. 72-1268

[July 7, 1972]

Appeal from the United States District Court
for the Northern District of California

Before: BARNES and GOODWIN, Circuit Judges, and McGOVERN, District Judge*

PER CURIAM:

Appellant Clifford Hersh was tried under a three-count indictment involving two counts of sale of dangerous drugs and one count of conspiracy to sell dangerous drugs. He was found guilty on the conspiracy count, and appeals from the judgment and sentence entered upon the verdict of guilt.

There are two main assignments of error on appeal. The first is that the trial court incorrectly denied appellant's Motion to Suppress certain evidence gath-

*The Honorable Walter T. McGovern, United States District Judge for the Western District of Washington, sitting by designation.

ered as a result of a search conducted by law enforcement officials on March 6, 1969 at Yountville, Napa County, California. The second is that the appellant was denied a fair trial because of the prosecutor's repeated reference to one Brovko, who did not testify.

March 6, 1969, two deputy sheriffs of Napa County visited a house in Yountville after receiving information from a roof repairman, McGregor, that he was suspicious that a laboratory was being operated on premises where he had made some roof repairs. The deputies did not have a search warrant. They knocked on the front door, but no one was home. While standing on the front porch, they peered through a window which was only partially covered with a drape. They saw oxygen tanks, beakers, other paraphernalia, and some white powdery substance on the floor. They then checked next door with a neighbor, one Milhouse, who told them that he had been keeping a log of the movements of his neighbors. Milhouse said that he had seen the neighbors bringing chemicals into the house. The next day, March 7, 1969, following a telephone call from Milhouse, the deputies returned to the house and arrested appellant and others as they were leaving in a car. The deputies seized some chemicals (at that time legal) that were in the car, and a small quantity of phencyclidine. The arrest and seizure were without warrant.

Appellant first argues that when the deputies peered through the window of the house on March 6th, it was a search within the meaning of the Fourth Amendment (*People v. Hurst,* 325 F.2d 891 (9th Cir.

1963)) and that since it was without a warrant, the subsequent seizure of evidence and arrest were the improper fruit of that unconstitutional act, and therefore invalid. He argues that he reasonably relied upon his right to privacy by drawing his blinds, by posting "No Trespassing" signs, and insists that the Fourth Amendment protects against searches outside the house as well as within.

The trial court, however, was satisfied that the observations through the window were not illegal, and we concur. This showing is based upon five facts established in the record:

(1) Signs reading "No Trespassing" were not posted on the premises.

(2) The property was not enclosed with a fence.

(3) The deputies went to the house only to talk with the person or persons living there.

(4) The officers approached the house openly in broad daylight, and

(5) The deputies merely looked through a window located immediately available to the left of the front door and did not have to move bushes or other objects out of the way to do so.

The Government relies on the following statement from *Davis v. United States,* 327 F.2d 301 (9th Cir. 1964), for authority that the actions of the deputies were proper:

"Absent express orders from the person in possession against any possible trespass, there is no

> rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof—whether the questioner be a pollster, a salesman, or an officer of the law."

Summarized, it's the Government's position that the deputies were in a place where they had a right to be, and that whatever they saw through the window was in *plain sight,* i.e., it was there to be seen, and was not therefore an improper search.

Appellant unsuccessfully argues his version of the facts, i.e., that the deputies did not just walk up to the door, knock and peer in one window, but rather, that they walked around the house and peered into all the windows. He claims that the plain sight doctrine is not here applicable because the deputies did not have just the intention to interview the occupants of the house, but rather, that they at all times intended to search the premises. However, the Motion to Suppress was argued on four separate occasions, and two different trial judges properly decided the issue against the appellant.

Additionally, the arresting officers received sufficient evidence from sources independent of the claimed illegal search to give them probable cause to arrest the appellant on March 7, 1969. The exclusionary rule of *Wong Sun v. United States,* 371 U.S. 471, 487 (1963), is not applicable here because sufficient

information to support the arrest and seizure came from untainted sources. The following facts support this contention.

(1) McGregor, a roofer, saw laboratory apparatus in the house.

(2) Milhouse, the neighbor, gave the deputies a list of chemicals he had seen carried into the house.

(3) Milhouse gave the deputies a record of the odd hour arrivals to and departures from the house.

(4) The officers checked and determined to their satisfaction that no license or permit had been issued for the operation of a laboratory on the premises.

(5) A man named Powell had rented the house ostensibly for use as a vacation spot in the country.

(6) The vehicle at the house was not owned by a man named Powell, but by a person named Hersh.

(7) The premises were being evacuated at an unusual time of the month.

(8) The deputies observed oxygen tanks and boxes being moved from the house on March 7th, and saw smoke emanating from the chimney.

The Government argues that those sources and bits of information were independently sufficient to sup-

port the arrest on March 7th without regard to the March 6th "peering through the window" information. Citing *Nardone v. United States,* 308 U.S. 338, 341 (1939), the Government shows that the decision to make the arrest was so attenuated with those independent facts that they dissipated the claimed taint, of which we found there to be none, stemming from the observation through the window.

In his remaining assignment of error, the appellant contends that the Assistant United States Attorney, who tried the case for the Government, improperly bolstered the Government's case at the trial by repeated references to one Nicolai Brovko, a cooperating agent, who did not testify. Brovko's connection with the case is that he gave a small notebook belonging to the defendant's partner (Ascensio) to the Government. That notebook contained information concerning their drug sales and allegedly identified the person designated as "C" in the book as Cliff Hersh, this defendant. Appellant contends that the United States Attorney did this in his Opening Statement, in his examination of Agent Schickedanz, and in his Closing Argument. He lists seven such events said to give rise to reversible error:

(1) That during his Opening Statement, the Assistant United States Attorney requested the Clerk to call the name of Brovko because he said that he did not know what Brovko looked like. Appellant says that the sole purpose for the act was to bring to the attention of the jury that Brovko was a Government witness.

(2) That moments after stating that Brovko was subpoenaed as a Government witness, the Assistant United States Attorney openly stated that Brovko was an absent witness and that he was essential to the Government's case. The allegation is that this was done solely to apprise the jury that Brovko had material evidence.

(3) That during his Opening Statement the Assistant United States Attorney referred to some "testimony" of Brovko in connection with the notebook. Such statement is claimed to be error on the ground that the United States Attorney knew that he would not be able to present evidence of that testimony, and that it was mentioned only to bring in matters that would not be in evidence.

(4) That the Assistant United States Attorney said in his Opening Statement that Brovko told the Government agent "everything he knew about the operation of Ascensio, defendant Hersh and one Varga." The appellant argues that the sole purpose was to inform the jury that Brovko gave incriminating information about defendant Hersh.

(5) That after Ascensio identified Hersh as the person who was referred to as "C" in the notebook, the Assistant United States Attorney attempted to bolster that testimony by asking Agent Schickedanz whether Brovko identified the person "C" when he turned the

notebook in. The objection to the question was overruled, and the witness answered "Yes". That is claimed error because the inference from the question and the answer was that "C" was the defendant Cliff Hersh.

(6) That the Assistant United States Attorney said at the end of his case that "with the exception of Mr. Brovko for whom an arrest warrant has been issued, by the Court, we have no further witnesses", and that Brovko was the only person who could testify about certain facts in the charged conspiracy. It is said that this constituted prejudicial evidence by inference.

(7) And finally, that the Assistant United States Attorney in his Closing Argument stated that Brovko knew the source of the illegal drugs and related that information to government agents, and that Ascensio did not testify contrary to what Brovko had told the agents. This is claimed error because it attempted to bolster the Ascensio testimony by evidence not on record.

Appellant argues that the Assistant United States Attorney knew or should have known that Brovko had not been served with a subpoena because the Marshal had served Brovko's father, and that defendant's trial counsel so informed the United States Attorney during the trial. Appellant therefore bases his contentions for reversal on the principles that a prosecu-

tor may not premise arguments on evidence not in the case or argue that unused evidence would have supported the Government's case.

The Government adequately answers each such claimed statement of error:

(1) It shows that the Assistant United States Attorney requested that the name of Brovko be called after the defense had requested that all of the witnesses be removed from the court room. The United States Attorney avers that he did not know what Brovko looked like and that from the return of service by the Marshal, he thought that Brovko had been served.

(2) The Assistant United States Attorney called Brovko "this absent witness" only after his name had been called in the court room and out in the hall. The Government successfully argues that it was necessary to refer to Brovko as an "essential" witness in order to persuade the judge to issue a bench warrant.

(3) As to the Assistant United States Attorney's
(4) reference in his Opening Statement to the notebook and Brovko's testimony as to it, the Government adequately explains that at such point in time, it reasonably expected Brovko to testify. It is also pointed out that the defense mentioned the same fact in its Opening Statement.

(5) As to the testimony by Schickedanz that Brovko stated the name of the person referred to as "C" in the notebook, the Government points out that the questioning ended there. The witness was not asked, nor did he state, the name of the person who was so identified.

(6) As to the statement at the end of the case that with the exception of the absent Brovko, the Government had no more witnesses, it is pointed out that the statement was made in conjunction with the request that the Government be allowed to re-open its case if Brovko was brought into court in time, a proper and reasonable request.

(7) The Government shows that rather than vouching for the accuracy of the nonexistent testimony of Brovko in its Closing Argument, that the Assistant United States Attorney instead expressly advised the jury that "You have no evidence before you as to anything that Mr. Brovko said."

And finally, it is pointed out that both counsel in Closing Argument, and the court by instruction, told the jury that statements by counsel were not evidence. It must be assumed that the jury followed the Court's instruction.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-378

CLIFFORD HERSH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner was charged in the United States District Court for the Northern District of California with two counts of unlawful sale of dangerous drugs —lysergic acid diethylamide (LSD)—in violation of former 21 U.S.C. 331(q)(2) (1964 ed., Supp. V) and with conspiracy in violation of 18 U.S.C. 371. Following a retrial by jury,[1] petitioner was convicted on the conspiracy count only, and was sentenced to an in-

[1] Petitioner's first trial ended with a jury disagreement.

determinate term of imprisonment pursuant to the provisions of 18 U.S.C. 4209. The court of appeals affirmed *per curiam* (Pet. App. A).

The relevant facts are not in dispute and are set forth fully in the opinion below. They show that on March 6, 1969, the Napa County Sheriff's Office was called by a repairman who had been hired by the owner of a house to repair its roof (M. Tr. 21-22).[2] The repairman reported that he suspected that the tenants were operating an illegal laboratory in the house, since he had observed what he thought to be laboratory apparatus inside (M. Tr. 29). He indicated that his suspicions had been further aroused by the fact that the windows of the house were covered with sheets and blankets (M. Tr. 48-50). Two detectives visited the house that day, knocked on the front door several times, but received no answer (Tr. 52). Beside the front door was a window, which had two or three inches uncovered (M. Tr. 23-24, 47; Tr. 53, 78). Looking through the window, the officers observed laboratory apparatus, including beakers, oxygen tanks and white powder strewn on the floor (M. Tr. 25, 29, 46; Tr. 53, 78). The officers then interviewed Victor Milhouse, a neighbor (M. Tr. 30-34; Tr. 54). Milhouse informed them that he had observed people arriving and departing the house at odd hours and produced a log detailing these movements (M. Tr. 30-31). Milhouse also gave the of-

[2] "Tr." and "M. Tr." refer respectively to the trial transcript and the transcript of the pre-trial hearing on petitioner's motion to suppress the evidence.

ficers a list of chemicals which he had seen being brought into the house (M. Tr. 33; Tr. 54).

The following day the police received a call from Mrs. Milhouse, stating that the occupants of the house were apparently packing their car and preparing to leave (M. Tr. 37-38; Tr. 58). The officers who arrived at the scene saw laboratory equipment being moved, and smoke coming from the chimney (M. Tr. 38-39; Tr. 59). They radioed for assistance, but before additional officers could arrive, the people in the house started to leave (M. Tr. 39; Tr. 59). The officers stopped the cars and placed the occupants, including petitioner, under arrest (M. Tr. 40; Tr. 59-60). The car in which petitioner was riding was searched and found to contain a quantity of phencyclidine (M. Tr. 40-41; Tr. 68-71).

Prior to each trial, petitioner moved to suppress the items seized as a result of his arrest. Following evidentiary hearings, these motions were denied by two district judges. The trial judge here, in denying the motion prior to the retrial, found that on the basis of the investigation, including the challenged view through the window, the officers had probable cause to arrest petitioner (Tr. 26). The court of appeals affirmed, noting in addition that the officers had sufficient evidence independent of the claimed illegal search to arrest petitioner (Pet. App. A iv-vi).

2. Petitioner contends that the viewing of the laboratory apparatus through the window constituted an unlawful search which tainted all that followed, including his arrest and the related seizures. The

claim is without merit. The officers were lawfully present when they looked through the uncovered portion of the window; they had arrived at the house in daytime through a means of access open to the general public and for the proper purpose of investigating information supplied by a private citizen. See *Harris* v. *United States*, 390 U.S. 234, 236.[3] The fact that the officers peered through the uncovered area of the front window did not convert their actions into an illegal search, since petitioner had no reasonable expectation that persons coming to his front door would not look through the uncovered portion of the adjacent window when they received no response to their knocking. Cf. *Katz* v. *United States*, 389 U.S. 347, 351-352.[4]

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[3] Petitioner contends the house was enclosed with a fence, clearly posted with "no trespassing" signs. However, this factual question was decided adversely to petitioner by the courts below (Pet. App. A iii).

[4] *California* v. *Krivda*, No. 71-651, certiorari granted, 405 U.S. 1039, relied on by petitioner (Pet. 9-10), is not in point. The issue there is wholly different: whether the seizure by police of material in a garbage can left for pickup outside the home violated the homeowner's reasonable expectation of privacy. Nor are *Texas* v. *Gonzales*, 388 F. 2d 145 (C.A. 5), and *Brock* v. *United States*, 223 F. 2d 681 (C.A. 5), relied on by petitioner (Pet. 10), in conflict with the holding here. Although in those cases the Fifth Circuit held that peering through windows of a home constituted an unreasonable search and seizure, the facts in both cases show that the officers went around to the side of the house, where there is a greater expectation of privacy, and peered through bedroom and side windows.

In any event, as the court below found, there was ample evidence independent of the view through the window which justified the arrest (Pet. App. A v). Once the officers were unable to reach anyone at the house identified by the repairman, the reasonable course, whether or not they had seen anything through the window, was to seek information from the neighbors. The evidence thus discovered, together with the information supplied by the repairman, amply justified the subsequent arrest to prevent the imminent departure of the suspects; the search of the automobile incident to that arrest was therefore lawful. See *Draper* v. *United States*, 358 U.S. 307, and *Carroll* v. *United States*, 267 U.S. 132.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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